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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 536

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

I

In our main brief, we argued (pp. 20-27) that the Natural Gas Act does not require a finding of justness and reasonableness of initial rates in certificate cases. Respondents, Long Island Lighting Company and Public Service Electric and Gas Company, concede the point (Br. p. 36). Respondent, Public Service Commission of the State of New York, also concedes the point (Br. p. 49). The Federal Power Commission, as *amicus curiae*, contends that this point was expressly pretermitted by the court below and that it need not

be reached by this Court in this case (Br. p. 28). However, if the Court is of a contrary view, the brief of the Federal Power Commission (at pp. 32-81) clearly supports and expands on our argument on this point.

II

While, as noted above, Respondents concede that a finding of justness and reasonableness of the initial rate is not required in a Section 7 certificate proceeding, they contend, on the other hand, that the Federal Power Commission is under a statutory duty to scrutinize and evaluate the initial price proposed in every Section 7 producer application (New York Commission Br., pp. 46, 48; Long Island, Br. pp. 30-32). The "prime determinant" of whether a certificate of public convenience and necessity should be issued to a producer is, according to the New York Commission (Br. p. 46), the level of the initial price proposed. Long Island and Public Service go so far as to contend that the Federal Power Commission must "regulate initial prices" (Br., p. 21).

Long Island and Public Service suggest a formula by which the "reasonableness of a proposed initial rate" should be tested by the Commission. Thus, they suggest that "comparison with going field prices, and consideration of such related matters as the volumes involved, the effect on the buying pipeline, and possibilities of escalation, would be an adequate test of the reasonableness of a proposed initial rate" (Br. p. 53).

The New York Commission contends (Br. p. 48) that:

> "* * * Unless it is affirmatively established therein that the proposed sale *at such proposed initial price*

> is, in all respects, reasonably in the public interest, the Commission is required by law either (1) to deny the application *in toto* or (2) to limit or condition the certificate to be issued upon reduction of the initial price to a level which the Commission has reason to believe will be without deleterious effect upon the interstate market, the interstate pipelines and, through them, the ultimate intrastate [sic] consumers. * * *"

Turning to the Long Island formula, it is to be noted that the 21.4-cent price here involved does compare favorably with going field prices (See New York Br., pp. 22-30; R. 351a). The CATCO gas reserve is the largest reserve ever committed to one sale, and is the first sale from a newly-developed offshore field (R. 521).[1] The effect on Tennessee, the buying pipeline, was to increase its average cost of purchased gas less than one cent per Mcf (R. 45a).[2] Failure to obtain the reserves would have impaired Tennessee's ability to expand its system so as to supply the increased demands of its customers.[3] The future price escalation pro-

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[1] Large gas reserves have greater value to pipeline companies and consumers in view of the fact that a single gathering facility can be used to obtain large volumes of gas. Attachment of several smaller reserves involves construction of more gathering facilities thereby increasing the cost of bringing gas into the pipeline system.

[2] Had Tennessee been obliged to obtain several smaller reserves equal in total to the CATCO reserve, the cost of service related to the additional gathering facilities might very well have been in excess of any price differential at which the smaller reserves might have been purchased.

[3] In this connection, it is interesting to note that Long Island and Public Service did not request additional gas supplies in Tennessee's recent major expansion program certificated by the Commission in Docket G-11107. The CATCO reserves constituted a highly important part of Tennessee's over-all reserves needed to support

vided for in the contracts are all subject to Federal Power Commission approval. Thus, contrary to Long Island's assertion (Br. p. 53), the CATCO price meets Long Island's suggested formula in every respect.

As to the New York Commission's contention, it is readily apparent that its quarrel with the Federal Power Commission stems from the fact that the Commission considered it more in the public interest to assure the CATCO gas reserves for the interstate market, than to insist on the 17-cent initial price condition[4] it had imposed in its May 20, 1957 order (R. 528-9), and thereby lose the reserves for the interstate market.

It is apparent from the foregoing and from Respondents' briefs that the basic question here is whether the Commission abused its discretion in issuing certificates to the producers without attaching a price condition. Respondents contend, in essence, that it was an abuse of discretion not to impose a price condition which would protect consumers against the possibility of temporarily paying a rate higher than a just and reasonable rate (Long Island Br. pp. 28-33, 36; New York Commission Br. p. 48). Respondents persist, however, in closing their eyes to the fact that imposition of the condition would have resulted in the loss of the CATCO reserves to the interstate market, and might have forestalled the ability of Tennessee to meet the increased requirements of its customers.

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that expansion program involving additional service to Tennessee's existing customers at an estimated cost of construction of $175,000,000 (See 17 F.P.C. 461, 469; Order issued in Docket G-11107 January 28, 1959).

[4] This price was selected simply because it was the highest price being paid at the time by Tennessee (R. 529).

The New York Commission is apparently of the view that the CATCO producers were "bluffing"; that they would have had to accept a price condition because there was no other market for the gas. (Br., p. 55). The short answer is that neither Tennessee nor the Commission believed the producers were "bluffing" (R. 416a-423a, 487). Additionally, the record shows that the CATCO producers had reserved in their contracts the right to build their own gathering system to bring the gas to the shore in the event satisfactory certificates were not received by a specified date (R. 93a-97a, 246a-247a). Regardless, the fact remains that the Power Commission, in the exercise of its judgment and discretion, considered it more in the public interest to assure the gas for the interstate market than to run the risk of losing the gas entirely.

It cannot be denied that there is a *possibility* that the 21.4-cent price may be found to be excessive in the rate investigation instituted by the Commission under Section 5(a). If so, the excess if any, paid for the gas from the date of initial deliveries (July, 1958) until the culmination of the pending Section 5(a) producer rate investigations, will not be subject to refund by the producers. Because of this *possibility,* Respondents argue that the Commission should have insisted on the 17-cent price condition with the one-day suspension technique. *Respondent's argument, carried to its logical conclusion, would require the Commission to use the same technique in each and every initial rate filing, as well as in each and every rate increase filing, to which an objection is raised.* The short answer to such contention is that Congress did not so provide, nor does the Natural Gas Act so contemplate. Congress did not give the Commission authority to suspend *initial rates. Federal Power Commission* v. *Hope*

Natural Gas Company, 320 U.S. 59. Nor did Congress require all increases in *existing filed rates* to be suspended on complaint, protest or otherwise. On the contrary, Section 4(e) of the Natural Gas Act makes it clear that the power to suspend changes in existing filed rates is a discretionary power lodged in the Commission. *Continental Oil Company* v. *F.P.C.*, 236 F. 2d 839, 843-4 (5th Cir., 1956); *cert. denied*, 352 U.S. 966, 77 S. Ct. 352.

This case was one calling for the exercise by the Power Commission of its informed judgment and administrative discretion. The opinion of the Commission, together with the dissenting opinion of Commissioner Connole, demonstrates clearly that the matter of price was very carefully considered and weighed by the Commission before it reached its decision to eliminate the 17-cent initial rate condition. The Commission, in the light of its evaluation of all the facts, and circumstances, was of the view that its rate investigation under Section 5(a) of the Natural Gas Act would best protect the public interest. Respondents argue that a different course of action would have better served the public interest. The law is well-settled, however, that where an administrative agency has a choice of remedies and selects one, that choice is not to be set aside merely because it is urged that another remedy might have been more appropriate (see cases cited in our main brief, p. 32).

There is nothing unique or novel in an administrative agency changing its views upon reconsideration. As the court stated in *Cia Mexicana de Gas* v. *F.P.C.*, 167 F. 2d 804, 806-7 (5th Cir., 1948):

> "A commission, * * * may, indeed should, change its findings and order if on rehearing it is of a

different mind. If it does so change, our function on a review of its findings and order is to determine not which of the two findings and orders was the best but whether, as claimed by petitioners, the findings and order under review are without evidence to support them. * * *"

III

Respondents attack the Federal Power Commission's finding as to the need by Tennessee for the gas involved here. The Commission's order issued January 28, 1959 in Docket G-11107 should remove any doubt as to the need by Tennessee for the gas involved.[5] In any event, Respondents cannot now attack the finding of need inasmuch as neither of them applied for rehearing of the April 22, 1957 and May 20, 1957 orders herein which granted a temporary certificate to Tennessee and permanent certificates to the producers, respectively, based on findings of need for the gas. If Respondents desired to challenge the grant of the certificates on the ground of lack of need for the gas, they were required to apply for rehearing of the orders granting those certificates. Section 19(a) of the Natural Gas Act; *Federal Power Commission* v. *Colorado Interstate Gas Company,* 348 U.S. 492, 497. Moreover, Respondents raised no question at the hearing concerning the need for the gas.

IV

The briefs of Respondents do not raise any matters, other than those discussed above, which are not

[5] Cf. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 529, wherein the Court stated in somewhat similar circumstances: "The contention in its farthest reach amounts to a legal version of the scriptural injunction against letting one's right hand know what one's left hand may be doing."

answered by the arguments contained in the main briefs and the *Amicus* brief of the Federal Power Commission. However, we take issue with the Federal Power Commission insofar as it states, in its *Amicus* brief (pp. 11, 18) that reversal of the judgment of the court below is unnecessary. As we read the *Amicus* brief, it is an excellent demonstration of the legality and propriety of the Commission order here under attack, and of the error of the court below. We, therefore, fail to understand how the Commission can validly contend that the judgment of the court below should not be reversed.

CONCLUSION

For the reasons here stated and in our main brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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May 18, 1959

SUPREME COURT OF THE UNITED STATES

Nos. 518 AND 536.—OCTOBER TERM, 1958.

The Atlantic Refining Co., Cities Service Production Company, Continental Oil Company, et al., Petitioners,	
518 v.	
Public Service Commission of the State of New York, Long Island Lighting Co., et al.	On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.
Tennessee Gas Transmission Co., Petitioner,	
536 v.	
Public Service Commission of the State of New York, Long Island Lighting Co., et al.	

[June 22, 1959.]

MR. JUSTICE CLARK delivered the opinion of the Court.

This proceeding tests the jurisdiction, as well as the discretion, of the Federal Power Commission in the certificating of the sale of natural gas under § 7 (e) of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*[1] The Commission has issued a

[1] Section 7 (e), 15 U. S. C. § 717f (e), provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension,

certificate of public convenience and necessity to petitioners, producers of natural gas[2] to sell to petitioner Tennessee Gas Transmission Co. 1.67 trillion cubic feet of natural gas at an initial price of 22.4 cents per MCF, including a tax of 1 cent per MCF. *Continental Oil Co., et al.*, 17 F. P. C. 880. In the same proceeding and on the same evidence it had twice refused to issue such an unconditional certificate because of "insufficient evidence or testimony . . . on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed." On the second occasion it proposed to petitioners that the certificates be conditioned upon an initial price of 18 cents per MCF (including the 1-cent tax), to be increased to 22.4 cents per MCF (including the 1-cent tax) after the first 24-hour delivery period, the latter rate to be subjected to the "just and reasonable" provisions of § 4 of the Act, 15 U. S. C. § 717c. The petitioners refused this proposal, and Tennessee advised the Commission that unless the certificates were issued without such conditions, CATCO would not dedicate its gas to the interstate market. Upon rehearing, after argument but without additional evidence, the Commission issued the certificates declaring "important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas" for interstate markets. 17 F. P. C., at 881.

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or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[2] These are the Atlantic Refining Company, Cities Service Production Company, Continental Oil Company, and Tidewater Oil Company, all petitioners in No. 518 and sometimes known as CATCO.

The respondents, other than the Public Service Commission of the State of New York, are public utilities in New York and New Jersey. They buy gas from petitioner Tennessee for distribution in those States. They and the New York Commission oppose the issuance of the certificates on the ground that their issuance will increase the price of gas to consumers in those States, of whom there are over a million, using Tennessee's gas. Upon the issuance of the certificates the respondents filed petitions for review with the Court of Appeals. It held that "Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment." *Public Service Comm'n of N. Y.* v. *Federal Power Comm'n*, 257 F. 2d 717, 723. Concluding that the Commission had no jurisdiction to conduct such "a *limited* inquiry," *ibid.*, it vacated the order granting the certificates and remanded the case to the Commission. The importance in the administration of the Act of the questions thus posed required the granting of certiorari, 358 U. S. 926 (1959). We have concluded that the Court of Appeals was in error in deciding that the Commission had no jurisdiction. However, for reasons hereafter developed we hold that the order of the Commission in granting the certificates was in error and we, therefore, affirm the judgment of the Court of Appeals.

The natural gas involved here is of a Miocene sand located below sea-bed out in the Gulf of Mexico some 15 to 25 miles offshore from Cameron and Vermillion Parishes, Louisiana. The petitioners in No. 518 are each independent natural gas producers. They jointly own oil and gas leases (25% to each company) which they obtained from Louisiana covering large acreages of the

Continental Shelf off the Louisiana coast. Jurisdiction over the Continental Shelf is claimed by the United States and the question is now in litigation. The Congress has continued existing leases in effect pending the outcome of the controversy over the title. 67 Stat. 462, 43 U. S. C. (Supp. I, 1954) §§ 1331–1343. The four companies' joint venture has resulted in the discovery of huge fields of natural gas and they have dedicated some 1.75 trillion cubic feet of gas from 95,000 acres of their leases to the petitioners Tennessee Gas Transmission Company, a natural gas company subject to the jurisdiction of the Commission.[3] The latter is the petitioner in No. 536 which has been consolidated with No. 518.

The four contracts dedicating the gas to Tennessee run from each of the petitioner producers. The contracts call for an initial price of 22.4 cents per MCF for the gas, including 1-cent tax, with escalation clauses calling for periodic increases in specific amounts.[4] In addition, they provide for Tennessee to receive the gas at platforms on the well sites out some 15 to 25 miles in the Gulf. This requires it to build approximately 107 miles of pipeline from its nearest existing pipeline point to the offshore platforms at wellhead. The estimated cost was $16,315,412. It further appears that the necessity for the certificates was based on an application of Tennessee, Docket G–11107, in which Tennessee requested certification to

[3] Tennessee operates a pipeline system extending from gas fields in Texas and Louisiana through Arkansas, Mississippi, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York and into Massachusetts, New Hampshire, Rhode Island and Connecticut. It serves some 80 distributing companies which in turn serve millions of consumers in the various States through which its pipeline traverses.

[4] These increases were later limited to 2 cents per MCF. The escalation clauses apparently were inserted in lieu of "favored nation" clauses, but by letter, not a part of the contracts, "favored nation" clauses were to be substituted at a later date on certain contingencies.

enlarge and extend its facilities. This program included the building of a pipeline from southeast Louisiana to Portland, Tennessee, which would carry a large proportion of the gas from these leases. Its cost was estimated at $85,000,000. In addition the contracts provide that Tennessee give free carriage from the wells to the shore of all condensate or distillate in the gas for the account of producers who have the option to separate it from the gas at shore stations. We need not discuss the contract provisions more minutely, though respondents do claim that other requirements place a greater burden on Tennessee and in practical effect increase the stated price of the gas to it.

The Presiding Examiner on March 29, 1957, found that the sales were required by the public convenience and necessity. *Continental Oil Co., et al.*, 17 F. P. C. 563. While he found that the proposed price was higher than any price Tennessee was then paying he pointed to other prices currently paid for onshore sales "for smaller reserves and smaller future potentials." *Id.*, at 571. The average weighted cost of gas to Tennessee he found would be increased, if the contract price was certificated, by .97 cents per MCF.[4] However, he said that no showing had been made that this would lead to an increase in

[4] The exact finding is as follows:

"Including the gas which Tennessee proposes to purchase under these contracts, some 240,000 M. c. f. per day (14.73 p. s. i. a.), it is estimated that the weighted average cost of all gas to Tennessee in 1958 will be some 13.70 cents per M. c. f., as compared with 12.73 cents if the gas here proposed to be purchased is excluded." 17 F. P. C. 563, 570.

Thus is the .97-cent figure derived. It is, however, a misleading figure, for the estimate for 1958 includes the 22.4-cent gas for only two months of 1958, November and December. There is no indication in the record as to what the cost increase would be if the weighted average were calculated by including the 22.4-cent gas for the full year.

Tennessee's rates to jurisdictional customers or result in an increase in the price governing its other purchases. He refused to condition the certificates on the acceptance of a lower price by the parties on the ground that no "showing of imprudence or of abuse of discretion by management," *ibid.*, had been made that indicated the proposed price could not be accepted temporarily as consistent with the public convenience and necessity, pending review in § 5 (a) proceeding. However, he did condition his recommendation on the approval of Tennessee's application in Docket G–11107 above mentioned.

The Commission, as we have indicated, took three strikes at the recommendations of the Examiner. On April 22 it reversed his finding on public convenience and necessity because the evidence was insufficient as to price. It said:

> "The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest." *Id., at* 575.

The Commission granted petitioners temporary certificates and remanded the proceeding to the Examiner "to determine at what rates the public convenience and necessity requires these sales" of natural gas to Tennessee under a permanent certificate. *Id.*, at 576. The producers immediately moved for modification, asserting that they

could not present sufficient evidence "within any reasonable period in the future" to meet the necessities of the remand and, further, could not "afford to commence construction until at least the initial rate [question] is resolved." The Commission on May 20, however, reiterated its belief that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level." 17 F. P. C. 732, 733–734. In an effort to ameliorate the situation represented by the producers, the Commission did grant the certificates but conditioned them upon the producers' acceptance of an initial price of 17 cents per MCF (plus the 1-cent tax), which was the highest price theretofore paid by Tennessee in the Southwest. It also agreed that one day after the commencement of deliveries of gas the 17-cent price would be escalated to 21.4 cents (plus 1 cent for taxes), the increase to be collected under bond, subject to proof and refund under the provisions of § 4 of the Act. This time Tennessee sought rehearing advising the Commission that the producers would not accept the 17-cent initial price order of May 20 and that "the contracts will be terminated" with the consequent "loss of natural gas supplies" required for Tennessee's customers. The Commission, after oral argument, did not withdraw its previous findings in the matter but predicated its third order on "the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. . . . In view of these circumstances and the fact that the record does not show that the 21.4-cent [plus 1 cent for taxes] rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding . . . should not assume the character of a rate proceeding under Section 5 (a)." 17 F. P. C. 880, 881. Asserting that it was of the opinion that it would be able "to adequately protect the public interest with respect

to the matter of price," *ibid.*, it ordered the certificates issued and directed that since the price "is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt investigation under Section 5 (a) as to its reasonableness." *Id.*, at 882.

We note that the Commission did not seek certiorari here but has filed a brief *amicus curiae*.* It does not urge reversal of the judgment but attacks the ground upon which the Court of Appeals bottomed its remand, namely, lack of Commission jurisdiction to consider the limited proposal of petitioners. The Commission's brief suggests that the Court not reach the issue tendered by petitioners, *i. e.*, must the Commission, in a § 7 proceeding, decide whether the proposed initial rate is just and reasonable? Instead, the Commission says, if the judgment must be affirmed it would be better to base the affirmance on the ground that its order "was not supported by sufficient evidence, and hence constituted an abuse of discretion in the circumstances of the particular case. . . ." Brief for the Federal Power Commission, p. 31. Petitioners oppose such a disposition contending the evidence was quite substantial.

I. Jurisdiction of the Commission.

The Court of Appeals thought that the Commission had no jurisdiction to consider petitioners' proposal because it was limited to a firm price agreed upon by the parties applicant. Their refusal to accept certification at a lower price, even to the extent of canceling their contracts and withholding the gas from interstate commerce, the court held, resulted in the Commission's losing jurisdiction. We do not believe that this follows. No sales, intra- or interstate, of gas had ever been made

* The brief is not signed by the Solicitor General but by both the General Counsel and the Solicitor of the Federal Power Commission.

from the leases involved here. The contracts under which the petitioners proposed to sell the gas in the interstate market were all conditioned on the issuance of certificates of public convenience and necessity. A failure by either party to secure such certificates rendered the contracts subject to termination. Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases. Nor is there doubt that the producers were at liberty to refuse conditional certificates proposed by the Commission's second order. While the refusal might have been couched in more diplomatic language, it had no effect on the Commission's power to act on the rehearing requested. Even though the Commission did march up the hill only to march down again upon reaching the summit we cannot say that this about-face deprived it of jurisdiction. We find nothing illegal in the petitioners' rejection of the alternative price proposed by the Commission and their standing firm on their own.

II. The Validity of the Order.

The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U. S. 591 (1944). As the original § 7 (c) provided, it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." 52 Stat. 825.[7] The Act was so framed as to

[7] The 1942 amendments to § 7, 56 Stat. 83, were not intended to change this declaration of purpose. See Hearings, House Interstate and Foreign Commerce Committee, on H. R. 5249, 77th Cong., 1st Sess. 18–19; H. R. Rep. No. 1290, 77th Cong., 1st Sess.; S. Rep. No. 948, 77th Cong., 2d Sess.

afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any "proposed service, sale, operation, construction, extension, or acquisition . . . will be required by the present or future public convenience and necessity," § 7 (e), 15 U. S. C. § 717f (e), and that all rates and charges "made, demanded or received" shall be "just and reasonable," § 4, 15 U. S. C. § 717 (c). The Act prohibits such movements unless and until the Commission issues a certificate of public convenience and necessity therefor, § 7 (c), 15 U. S. C. § 717f (c). Section 7 (e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension provision of § 4 and the posting of a bond, where required. This not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases. The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act, 15 U. S. C. § 717d, which authorizes the Commission *sua sponte*, or otherwise, to institute an investigation into existing rates and charges and to fix them at a just and reasonable level. Under this section, however, the rate found by the Commission to be just and reasonable becomes effective

prospectively only. Gas purchasers, therefore, have no protection from excessive charges collected during the pendency of a § 5 proceeding.

In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under § 7 (e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable. Although *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, was decided in 1954, cases instituted under § 5 are still in the investigative stage. This long delay, without the protection of refund, as is possible in a § 4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend. Moreover, the fact that the Commission was not given the power to suspend initial rates under § 7 makes it the more important, as the Commission itself says, that "this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest." 17 F. P. C. 563, 575.

This is especially true where, as here, the initial price will set a pattern in an area where enormous reserves of gas appear to be present. We note that in petitioners' proof a map of the Continental Shelf area off of the coast of Louisiana shows that the leases here involved cover but 17 out of a blocked-out area covering some 900 blocks of 5,000 acres each. The potential of this vast acreage, in light of discoveries already made as shown by the record, is stupendous. The Commission has found that the transaction here covers the largest reserve ever committed to interstate commerce in a single sale. Indications are that it is but a puff in comparison to the enormous potentials present under the sea-bed of the Gulf. The price certificated will in effect become the floor for

future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 23 cents per MCF. New price plateaus will thus be created as new contracts are made and unless controlled will result in "exploitation" at the expense of the consumer, who eventually pays for the increases in his monthly bill.

It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5. Nor do we hold that a "just and reasonable" rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7. Their proposals must be supported by evidence showing their necessity to "the present or future public convenience and necessity" before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7 (e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.

There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in § 7 (e), has authorized the Commission to condition certificates in

such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of "favored nation" clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.

This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. Thus the purpose of the Congress "to create a comprehensive and effective regulatory scheme," *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana,* 332 U. S. 507, 520 (1947), is given full recognition. And § 7 is given only that scope necessary for "a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission . . . ." *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* at 341. On the other hand if unconditional certificates are issued where the rate is not clearly shown to be required by the public conven-

ience and necessity, relief is limited to § 5 proceedings, and, as we have indicated, full protection of the public interest is not afforded.

Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates. The witnesses tendered developed little more information than was included in the printed contracts. As the proposed contract price was higher than any paid by Tennessee, including offshore production in the West Delta area of Louisiana, it is surprising that evidence, if available, was not introduced as to the relative costs of production in the two submerged areas. Moreover the record indicates that the proposed price was some 70% higher than the weighted average cost of gas to Tennessee; still no effort was made to give the "reason why." More damaging, was the evidence that this price was greatly in excess of that Tennessee pays from any lease in southern Louisiana. Likewise the $16,000,000 pipeline to the producers' wells was unsupported by evidence of practice or custom. Respondents contend—and it stands undenied—that this alone would add 2 cents per MCF to the cost of the gas. Again the free movement of distillates retained by the producers was "shrugged off" as being *de minimis*, without any supporting data whatever. Nor was the evidence as to whether the certification of this price would "trigger" increases in leases with "favored nation" clauses convincing, and the claim that it would not lead to an increase in rates by Tennessee was not only unsupported but has already proven unfounded.[8]

[8] Tennessee has subsequently filed an application with the F. P. C. requesting higher rates designed to produce some $19,000,000 additional annual revenue. *Tennessee Gas Transmission Co.*, Docket G–17166.

Nor do we find any support whatever in the record for the conclusory finding on which the order was based that "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas." 17 F. P. C. 880, 881. Admittedly any such need was wrapped up in the Commission's action in Docket G–11107, where Tennessee was asking for permission to enlarge its facilities. However, the two dockets were not consolidated and the Presiding Examiner conditioned his approval here on the granting of the application in Docket G–11107, no part of which record is here. Neither is there evidence supporting the finding that the producers "would seek to dispose of their gas elsewhere than to Tennessee Gas and the interstate market," *ibid.* While the Commission says that statements were made in argument, apparently by counsel, that this was the case, we find no such testimony. Since some 90% of all commercial gas moves into the interstate market, the sale of such vast quantities as available here would hardly be profitable except interstate.

These considerations require an affirmance of the judgment with instructions that the applications be remanded to the Commission for further proceedings.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 518 AND 536.—OCTOBER TERM, 1958.

The Atlantic Refining Co., Cities Service Production Company, Continental Oil Company, et al., Petitioners,	
518 v.	
Public Service Commission of the State of New York, Long Island Lighting Co., et al.	On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.
Tennessee Gas Transmission Co., Petitioner,	
536 v.	
Public Service Commission of the State of New York, Long Island Lighting Co., et al.	

[June 22, 1959.]

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins, concurring.

I agree with the judgment of the Court on the ground that the findings upon which the Commission based its conclusion that the public convenience and necessity required the issuance to petitioners of unconditional final certificates find no support in the record. There is no evidence supporting what appear to be the crucial findings that (1) "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas," particularly insofar as this finding implies that this need is immediate and cannot be satisfied from Tennessee's existing reserves, and (2) that there

was serious danger that producer petitioners' gas would be permanently lost to the interstate market unless an unconditional certificate were granted on their terms. This makes it unnecessary to consider at this stage any of the other questions sought to be presented by the parties.